KEDAH REPORT.

(APPELLATE CIVIL JURISDICTION)
WHITLEY, Ag. C. J. (S.S.)
TERRELL, Ag. C. J. (F.M.S.) &
GORDON SMITH, J.
October 12, 1936

A. R. R. M. ARUNASALAM CHETTY SON OF SITHAMBARAM CHETTY.....
Plaintiff (Appellant)

vs.

1. TEAH AH POH TRADING UNDER THE STYLE OF MUN SENG HIN KEE.
2. TEAH SOO CHEW TRADING UNDER THE STYLE OF TEAH CHIN SENG.....

Defendants (Respondents)

[KEDAH CIVIL APPEALS Nos. 2 and 15 of 1355]
[KEDAH CIVIL SUIT No. 11 of 1354]

Equitable charge—deposit of Surat Kechil—collateral security—absence of memorandum—Land Enactment, 1332; Courts Enactment No. 25, S. 11; Limitation Enactment, s. 24.

The defendants executed two promissory notes in favour of the plaintiff (appellant), both notes being signed by the second defendant as surety. The first defendant at the same time deposited with the plaintiff Surat Kechil No. 11208 as collateral security without any memorandum. In a suit against the defendants the plaintiff claimed a declaration that he was entitled to be considered as a chargee of the lands comprised in the Surat Kechil and for judgment for the amount due on the promissory notes, The Acting Second Malay Judge in the Second Division rejected the claim. An appeal to the Court of the Judge of the First Division was dismissed. The plaintiff appealed to the Court of Appeal.

Held, that principles of equity in force in the Colony of the Straits Settlements were properly applied in the present case, where such application would not be inconsistent with the provisions of any Kedah Enactment.

Held also, that the deposit of the Surat Kechil as security for the repayment of the defendants' debts operated as an equitable charge by virtue of which the plaintiff acquired an equitable interest in the land comprised in the Surat Kechil and that, as the claim was brought within Section 24 of the Limitation Enactment, it was not barred.

APPEAL.

Ong Huck Lim for the plaintiff (appellant)

First defendant (respondent) in person.

Second defendant (respondent) in person.

Cur. Ad. Vult.

WHITLEY, AG. C. J. (S.S.)—This is an appeal by the Plaintiff from a judgment of Kellagher J. in the First Division dismissing an appeal to him from a judgment of the Acting Second Malay Judge in the Second Division.

The learned trial Judge made no finding on the facts but Kellagher J. accepted the evidence of the Plaintiff Appellant as being a correct statement and I feel no doubt that he was right in so doing. It must accordingly be taken as established that on the 9th April, 1929, the first Defendant made two promissory notes in favour of the Plaintiff, one being for $1,000 with interest payable on demand and the other for $1,100 repayable by monthly instalments of $110. Both promissory notes were signed by the second Defendant as surety and at the time that the two promissory notes were made a Surat Kechil Number 11208 was deposited by the first Defendant with the Plaintiff as collateral security without any memorandum. Only one payment was made on each promissory note namely on 29th May, 1929.

By his plaint the Plaintiff claimed:

(a) a declaration that he was entitled to be considered as a chargee of the lands comprised in the Surat Kechil.

(b) Judgment for the sum due for principal and interest on the two promissory notes.

The trial Judge dismissed the claim on the promissory notes as being barred by Limitation and gave judgment for the Defendants with costs. He did not deal with the claim for a declaration. At the hearing of the appeal to the Court of the First Division counsel for the appellant withdrew the appeal against the second Defendant and submitted that as against the first Dedendant he was entitled to the declaration claimed in his plaint and accordingly the point which Kellagher J. had to decide was whether the Plaintiff is an equitable chargee by deposit of the Surat Kechil. If he is it would follow that his claim on the promissory notes would not be barred as it would come within section 24 of the Limitation Enactment. Kellagher, J. held that the deposit of the Surat Kechil did not make him an equitable chargee and dismissed the appeal. The learned Judge gave the grounds for his decision in a clear and carefully reasoned judgment which was of great assistance at the hearing of the appeal before us as it fully set out the arguments in favour of the respondent who was not represented by counsel. The view which he took was that the respondent merely deposited the Surat Kechil as security for the repayment of the debt and that it did not necessarily follow that he intended by the deposit to constitute the appellant an equitable chargee, the deposit being equally consistent with the intention that the respondent should thereby merely prevent himself from dealing further with the land inasmuch as he parted with possession of what was in effect his only document of title. He was further of the opinion that, when considering whether it

should apply the principles of equity in force in the Colony of the Straits Settlements as provided by Section 11 of the Courts Enactment No. 25, the Court should not apply them in any case where the result of such application would be inconsistent with the provisions of any Kedah Enactment or the aims or objects of such Enactment, and that to give the appellant the declaration asked for would be to create in him an interest entirely inconsistent with the basic principles of the Land Enactment 1332.

Section 11 of the Courts Enactment provides *inter alia* that the Court of Appeal shall in matters of contract apply the principles of equity in force in the Colony subject always to the provisions of Kedah Enactments. The principles of equity in force in the Colony are those in force in England so that as the point under consideration is clearly a matter of contract it is our duty to apply English principles of equity provided that in so doing we do not do violence to the provisions of any Kedah Enactment. At the date of the deposit the Enactment in force was the Land Enactment 1332, now repealed. That Enactment was based on the old Land Enactment of the Federated Malay States which was in turn founded on the Australian Torrens System.

Section 156 of the Land Enactment 1332 reads "The register is a record of transactions relating to land——" and the learned Judge below is undoubtedly correct when he observes that two of the objects of the Torrens System of registration are to afford the public the means of knowing what are the charges upon and incumbrances affecting land and to ensure the chargee some measure of protection against fraud. If a chargee neglects to avail himself of the means of protection provided by the Enactment he does so at his peril and runs the risk of losing the benefit of any priorities which he might otherwise have acquired as against third parties. But in the present case the appellant has nothing capable of being registered. All he had was physical possession of the Surat Kechil coupled with the intention to create a security which might be inferred from the fact of the deposit.

Nor had he any lien such as is recognised by section 80 of the Federated Malay States Registration of Titles Enactment 1911 to which protection could have been given by a caveat; for there is no corresponding section in the Kedah Enactment. It thus seems clear that the appellant has not left undone anything which he could have done or ought to have done under the Land Enactment and I fail to see how we can be said to be acting in contravention of any Kedah Enactment or to be doing anything inconsistent with the objects of the Kedah system of land registration if we apply in this case the principles of equity in force in the Colony as provided by section 11 of the Courts Enactment. There being in my opinion nothing in any local enactment to prevent us from applying those principles I will now consider whether in equity the appellant is entitled to the relief which he asks for.

The leading Kedah case is that of *Karuppan Chetty* v. *Muthia Chetty*, Civil Appeal No. 5 of 1349 (unreported) which was decided by this Court in 1931 and both before us and in the Court below counsel for the appellant relied strongly upon the judgment of the Court in that case. There the facts were that certain documents of title had been deposited as collateral security for debt together with a signed undertaking by the depositors to execute a charge over the relevant lands as soon as sub-division of the land included in one of the titles had been carried out by the Land Office and it was held that an execution creditor could only seize the debtor's beneficial interest in the lands and as the lands were subject to the equitable interest of the appellant Section 10 (now Section 11) of the Courts Enactment should be applied to give effect to the appellant's equitable rights under the agreement. Kellagher, J. distinguished that case mainly on the ground that there was a written undertaking to give a charge whereas in the present case there is no such written undertaking. Undoubtedly there is that distinction between the cases but in my opinion it does not necessarily follow from the absence of any such memorandum in writing that the present appellant's rights in equity are any less than those which the Court held that the execution creditor possessed in the earlier case. That case is clear authority—if authority is needed—for the proposition that in a case such as the present English principles of equity should be applied subject of course to the provisions of Kedah Enactments which I have already dealt with. The position in this State in that respect is the same as it is in Australia where it is now well settled that under the Commonwealth system of registration of titles to land the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Australian Real Property Acts (See the judgment of the Privy Council in *Abigail* v. *Lapin*, 1934, A.C. at pp. 491, 502). What those equitable rights are in the case of a depositee of title deeds is stated as follows in *Coote* on Mortgages, 9th Edition page 86:

"A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing a debt operates as an equitable mortgage or charge, by virtue of which the depositee acquires————an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the Court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown." Applying this well established principle to the Australian system Mr. Hogg in his work on the "Registration of Title to Land throughout the Empire" at page 281, observes that the better opinion seems to be, on principle and the balance of authority, that the certificate of title, though not strictly a muniment of title, is yet such a document of title relating to the land that it is to be treated as an actual title deed for the purpose of implying an agreement to charge the land in favour of the depositee, the charge conferring the same remedies as a deposit of ordinary title deeds, provided that there is an actual deposit of the document into the possession and control of the creditor.

With the greatest respect for the judge below I find myself unable to agree with the view which he took as to the intent to be inferred from the deposit of the Surat Kechil. It seems to me that the intention to create a security must have been present to the minds of the parties when the deposit was made and accordingly an equitable mortgage was created. The position of an equitable mortgagee by deposit, such as I hold the appellant to be, is shortly stated by Stevens J. in his judgment in *The Ho Hong Bank* v. *Chop Hock Chin Leong*, (1929) S.S.L.R. at page 202 as follows:—

> "He is allowed by Courts of equity to enforce his agreement and thereby acquire a title, or exercise those rights of foreclosure and sale, which are ordinarily incidental to a legal mortgage. But he has no title in the ordinary sense—he has in his possession the indicia of another's title; and it is precisely because he has no title that he is compelled to invoke the equitable jurisdiction of the Court to obtain his rights."

It follows then that in my opinion the appellant is entitled to a declaration that he is an equitable chargee of the lands comprised in the Surat Kechil and, as his claim is thus brought under section 24 of the Limitation Enactment, it is not barred, and I would accordingly allow the appeal and set aside the orders in the Courts below.

In addition to the declaration and consequential thereto the appellant asks for an order for sale. In my opinion he is entitled to this and the proper order would be that there be a sale by the Court and that the appellant be at liberty to receive and give effectual receipts for the purchase price and to retain out of the same sufficient to cover the debt with interest and costs. The respondent must pay the appellant's costs of the appeal and in the Court of the First Division.

As regards the costs in the Second Division the appellant is entitled to his costs as against the First Defendant Respondent, not including any costs of counsel. The Appellant must pay the costs of the Second Defendant in the First and Second Divisions as already ordered.

The deposit will be paid out to the appellant or his solicitor.

TERRELL, AG. C. J.—On the 9th of April 1929 the first defendant, respondent on this appeal, executed two promissory notes in favour of the plaintiff-appellant. The promissory notes were signed by the second defendant as surety. At the time the promissory notes were made the first defendant deposited with the plaintiff Surat Kechil 11208 as collateral security. One payment of interest only has been made on each of the promissory notes, namely on the 29th May, 1929.

The plaintiff filed his plaint on the 11th October, 1935. The relief he asked for was as follows:—

(1) that it may be declared that the plaintiff is entitled to be conisdered as a chargee of the lands comprised in Surat Kechil No. 11208 situate in the Mukim of Sungei Patani in the District of Kuala Muda for the sum of $4,876.40 with interest thereon at the rate of $2.00 per $100.00 per mensem from the 9th. day of October, 1935;

(2) Judgment for the said sum of $4,876.40 being money due to the plaintiff, particulars of which are as follows....

The claim for a money judgment was dismissed by the learned Judge of the Second Division as being barred under the Limitation Enactment. There can be no doubt that this decision was correct, and on appeal to the First Division of the Court the appellant abandoned his appeal against the second defendant, and only asked for a declaration that he was an equitable mortgagee in respect of Surat Kechil 11208. His appeal was dismissed, and he now

appeals to the Court of Appeal asking for the same declaration and consequential relief.

There seems to have been a certain conflict of evidence, but after hearing the submissions made by the respondent in person before the Court of Appeal, I have no hesitation in agreeing with the finding of the learned Judge of the First Division that the plaintiff's evidence should be accepted as a correct statement of the facts. The learned Judge of the Second Division made no finding on the points in dispute.

I, therefore, start with the position that the respondent deposited the title deed with the appellant as security for the repayment of the debt. The learned Judge of the First Division, however, questions whether the respondent intended the appellant to hold the grant as an equitable chargee. With all respect to the learned Judge I find it difficult to appreciate the difference. The reason, however, given by the learned Judge is that there was no written or oral agreement by the respondent to execute a registrable charge in favour of the appellant, and in the absence of such an agreement the learned Judge distinguishes the Court of Appeal decision in *K. A. L. R. M. Karuppan Chetty* v. *A. R. P. L. S. P. Muthiah Chetty*, Kedah Civil Appeal 5/1349 dated 4th September, 1931, where there was a written agreement to give a registrable security. I will refer to this decision later.

It should be pointed out, however, that in all jurisdictions whether there is a system of registration of titles or not, documents of title are habitually deposited as security for debts, and that a specific agreement to execute a formal mortgage or charge is the exception rather than the rule. Where no agreement has been made in writing and no oral agreement has been proved, the Court must decide what is the proper inference to be drawn from the conduct of the parties. The learned Judge of the First Division has found that the proper inference is that the grant was deposited as security for the repayment of the debt. Having so found, it appears to me illogical to suggest that the plaintiff might only desire to have the grant in his possession in order that the land might be made the subject of execution. This remedy would be available to all judgment creditors whether they had possession of the grant or not, and although this remedy may be ultimately available, it cannot properly be described as a security. Either he has obtained some security for his debt by the fact of the deposit, or else he has no security whatever.

If there had been an agreement to give a registrable security, a different form of relief would have been appropriate, namely specific performance of the agreement. This is not what the plaintiff claims. He asks the Court to declare that he has an equitable security which is not registrable under the Land Code, and which, if enforceable, can only be enforced after recourse to the Court.

If then the intention of the parties was that the grant should be deposited as security for the debt, the only question is whether the provisions of the Land Code prohibit the Courts from giving effect to such intention.

The learned Judge of the First Division has called attention to the fundamental difference between the registration of title to land in the Colony and that existing in Kedah. There is in fact no registration of title in the Colony, but merely registration of deeds, which is a different thing. A closer comparison would be with the interpretation of the law in other jurisdictions which have adopted the Torrens system of registration of title, and notwithstanding certain important differences, it will be useful to examine in particular the interpretation placed by the Courts on the F.M.S., Land Enactment, 1911, and the Registration of Titles Enactment 1911, upon which the Kedah Land Code is admittedly based.

On the subject of mortgage by equitable deposit of the certificate of title in other jurisdictions, I would refer to the section dealing with this matter in *Hogg's* Registration of Title to Land throughout the Empire, 1920, pages 278 to 285. The learned author points out (page 279) that in certain jurisdictions the statutes explicitly provide for equitable mortgage by deposit, in others any such provision is merely implied, and in others again the statutes are quite silent on the subject, and that in some jurisdictions the want of statutory enactment has been supplied by judicial decision. In only one jurisdiction, namely New Zealand, has the equitable rule by which security can be given over land by a mere deposit of documents of title, been definitely abrogated as part of the local law (page 282).

Now, the F.M.S. Enactments, upon which the Kedah Land Code is based definitely recognise an equitable mortgage by deposit. First of all, as in the case of Victoria—Western Australia—there is a provision, section 79 (i) (h) of the Registration of Titles Enactment, 1911, that production of the Certificate of Title may in certain cases be dispensed with, provided that the Registrar is satisfied that such certificate has not been deposited by way of lien or security. This provision, therefore, impliedly recognises a

lien by deposit. Then there is the express provision of section 80 of the same Enactment that the lien-holder may in certain cases implement his security by registering a caveat. In this connection it is of interest to remark that it has been decided by the Court of Appeal in the Federated Malay States on more than one occasion, that the lien exists independently of the registration of any caveat *(Palaniappa Chetty* v. *Dupire Bros.* 1 F.M.S. Law Reports, page 370, and *Registrar of Supreme Court* v. *Keng Peng Kee,* 3 F.M.S. Law Reports, page 80). The caveat section like the corresponding section 103 in the present Kedah Land Code, Enactment No. 56 (Land), is merely an enabling section, giving a lien-holder the opportunity of strengthening his security by getting a notice of his lien put upon the register.

It is true that the Kedah Land Code of 1332 is a very abridged reproduction of the F.M.S. Enactment, and that these two sections of the F.M.S. Registration of Titles Enactment 1911 were not reproduced, but it is difficult to believe that it was the deliberate intention of the Kedah legislature by the mere omission to exclude the recognition of the principle of an equitable deposit. If that had been the intention, one would have expected a statutory abrogation of the right, as in the New Zealand Statutes. Quite apart from the fact that the Kedah Code is based upon the F.M.S. Enactments, and that accordingly one would expect the same general principle to apply, there is the analogy of judicial decisions in Sasketchewan, Alberta, and the North-west Territories of Canada, where as in Kedah, there is no reference to the possibility of a missing certificate of title having been deposited as security for money. Nevertheless, equitable mortgages by deposit have been held to be as valid as in Victoria, New South Wales, etc., (see *Hogg,* page 282). There are in addition certain other reasons why in Kedah an equitable security by deposit should be recognised. Firstly section 141 of the Civil Procedure Code of 1338, which came into force six years after the Land Code of 1332, provides as follows:—

> "If the Court is satisfied that the property is subject to a mortgage, charge or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so subject to such mortgage, charge or lien."

At the time that this Civil Procedure Code was brought into force, there was no statutory lien such as now exists by virtue of section 103 of Enactment No. 56 (Land). So far, therefore, as concerns immoveable property, the only possible lien can be that created by a deposit of the certificate of title; and it may be inferred, therefore, that the legislature recognised that such a lien might exist outside the Land Code.

Secondly, the effect of section 11 of the Courts Enactment is to recognise the principles of equity as obtaining in the Colony of the Straits Settlements, subject to the provisions of any Enactment. The learned Judge of the First Division appears to consider that the proviso makes equitable principles inapplicable in cases of immoveable property. But there is nothing in the Land Code which so provides. An equitable mortgage by deposit is not a charge contravening the express terms of the Land Code; it is a form of security quite outside the Land Code to which effect may be given as a contract *inter partes,* and which can only be implemented by means of an order of Court. That such interests may exist as contracts *inter personas,* and quite outside any registration of titles enactment is fully recognised by the Privy Council in the case of *Abigail* v. *Lapin,* 1934 A.C. 491, the principle of which decision was recently adopted by the F.M.S. Court of Appeal in the case of *A. M. M. Murugappa Chetty* v. *S. Seenivasagam and Others,* (1936) F.M.S.L.R., 33; (1936) 5 M.L.J. 217. The principle was even more clearly recognised in the case of *Haji Abdul Rahman* v. *Mohamed Hassan,* 1917 A.C. page 209. This was a decision upon section 4 of the Selangor Registration of Titles Regulation which is set out in full on pages 213 and 214 of the Privy Council Report, and is a very stringent and far-reaching provision, as compared with section 137 of the Land Code of 1332 which merely provides as follows:—

> "Henceforward from the date of this Enactment, no unregistered document of charge shall be admitted as being a charge on land."

In commenting on section 4 of the Selangor Regulation, Lord Dunedin at page 214 says:—

> "It (section 4) does not profess to prohibit or strike at contracts in reference to land provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge or otherwise deal with the land itself."

If this is the correct method of interpreting Selangor Regulation section 4, the same reasoning applies *a fortiori* to the interpretation of section 137 of the Kedah Land Code 1332. The deposit by the appellant should be treated as a contract by him to give the respondent the land as security for his debt. It is not a registrable

security, and as such is outside the provisions of the Land Code.

The learned Judge has in fact based himself on the idea of what a registration of title enactment ought to be, as visualised by Innes in his work on land registration in the F.M.S. (1913). The learned author makes it quite clear in many passages, apart from those quoted by the learned Judge of the First Division, that in his opinion the Land Code and the Registration of Titles Enactment should regulate all possible dealings with land, and that no transaction outside the Land Code should be recognised at all. He looks with extreme disfavour on the decision of the Privy Council in *Loke Yew* v. *The Port Swettenham Rubber Co.*, 1913 A.C. page 491 (see page 21 *et seq.* in *Innes*). It is, however, too late to adopt this view, even in the Federated Malay States, where English principles of equity as such are not applicable. It is the duty of the Courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds. Registration of titles was introduced to prevent fraud, but to use it for the purpose of prohibiting, or rendering nugatory, ordinary commercial transactions not expressly covered by the Enactment, is to enable the Enactment to be used as an instrument of fraud. Even in the Federated Malay States, therefore, the Courts have found themselves constrained again and again to apply equitable principles, not because English equitable principles apply, but because the application of such principles is in accordance with natural justice. I would refer in particular to the case of *Boase* v. *Chung Rubber Estates Ltd., and Others*, 2 F.M.S. Law Reports, p. 130 and the more recent case of *Arumugam* v. *The Motor Emporium*, (1933-34) F.M.S.L.R. 21; (1933) 2 M.L.J. 276.

If this has been the course of judicial decision in the Federated Malay States, there is all the more reason for applying the same principles in Kedah, where not only is the Land Code founded on that of the Federated Malay States, but English equitable principles are expressly applicable by virtue of section 11 of the Courts Enactment.

Furthermore, in Kedah Civil Appeal No. 5/49 above referred to, it was distinctly laid down that these equitable principles should be given effect to. It is of course true that the facts of the case are rather different, but it is abundantly clear that the Court recognised that a depositee of a Surat Putus had an equitable interest to which the Cost would give effect. In the case the interest was founded on an agreement in writing, but such agreement was not registered and was not in fact registrable. It was accordingly an interest entirely outside the Land Code. I think that the learned Judge of the First Division should have recognised that the principle of that decision was binding upon him, and that the appellant was entitled to the declaration which he claimed.

Being entitled to such declaration, which as it were crystallises his security, he will also be entitled to enforce such security by sale, and to be paid out of the proceeds the amount owing to him upon his promissory notes.

The appellant will be entitled to his costs against the respondent in the Court of Appeal and in both Courts below. The orders for the payment of the 2nd defendant's costs in the 1st and 2nd Divisions will stand. The deposit should be paid out to the appellant or his solicitor.

GORDON SMITH, J.—This is an Appeal from a decision of Mr. Justice Kellagher given in the First Division Civil Appeal No. 15 of 1355.

In the Court of first instance the Appellant had claimed:—

(a) a Declaration that he was entitled to be considered as chargee of lands comprised in Surat Kechil 11208 situated in Sungei Patani, Mukim of Kuala Muda District;

(b) judgment for the sum of $4,876.40, being principal and interest due on two Promissory Notes for $1,000 and $1,100 respectively, both dated 9th April, 1929.

The learned Malay Judge dismissed the claim on the Promissory Notes as being statute barred but failed to deal with the claim for the declaration.

The learned Judge in the First Division upheld the decision as regards the claim on the Promissory Notes and dealt with the claim for the declaration. It is only this latter part of his judgment which is the subject matter of the appeal before us. In effect, the Appellant's contention is that although the personal claim against the Respondent in respect of the Promissory Notes is barred by the Limitation Enactment, he is entitled to be regarded as an equitable chargee of the land by reason of the concurrent deposit of the title deed and that his remedies (whatever they may be) as such equitable chargee are covered by Article 24 of the Limitation Enactment under which a period of twelve years is allowed, and consequently such remedies are not barred by the Limitation Enactment.

It was argued before the learned Judge that the principle laid down in the F.M.S. case of *Palaniappa Chetty* v. *Dupire Bros.* 1 F.M.S.L.R. p. 370 had been applied to Kedah in the case of *K.A.L.R.M. Karuppan Chetty* v. *A.R.P.L.S.P. Muthia Chetty*, Kedah Civil Appeal No. 5 of 1349, and that the Court should apply Section 10 (now Section 11) of the Courts Enactment.

The learned Judge distinguished the latter case with the present case by reason of the fact that in such latter case documents of title had been deposited as collateral security for the debt together with a signed undertaking by the depositors to execute a charge, whereas in the present case, although there had been a similar deposit, there was no such signed undertaking; in other words, there was no memorandum of deposit accompanying the same.

The learned Judge throughout his judgment emphasizes this distinction and in effect comes to the conclusion that the mere deposit of title deeds unaccompanied by any memorandum of deposit or charge was insufficient to constitute the depositee an equitable chargee of the land so as to enable the Court to apply Section 10 of the Courts Enactment and grant equitable relief to the depositee by way of realization of the collateral security afforded by such deposit.

Both before the learned Judge and before us the Respondent maintained that the title deed had been deposited by him with the Appellant in respect of and as security for an earlier debt which had long since been liquidated, but he failed to explain satisfactorily why, in such case, the title deed had not been recovered. The learned Judge found as a fact that the deposit of the title deed by the Respondent was as security for the debt in question. We heard the Respondent and in my opinion there was ample justification for this conclusion arrived at by the learned Judge but he also stated that as the absence of the deed from the possession of the Respondent would prevent him from dealing with the land, therefore the Respondent did not necessarily intend by such deposit to constitute the Appellant an equitable chargee.

I am unable to agree with this latter conclusion of the learned Judge. It is, I think, quite clear that, as found by the learned Judge himself, the deed was deposited as security for repayment of the debt and was intended to secure the debt.

Where there is such a deposit and such intention even though such intention is not evidenced by any written memorandum, then an equitable mortgage is created and the depositee becomes an equitable mortgagee or chargee. This, I think, is clear from the decisions of Thornton J. in *Samy Nathan Chetty* v. *Ramasamy Chetty*, 8 S.S.L.R. 117, and Stevens, J. in *Ho Hong Bank Ltd.* v. *Teo Chin Chay*, (1929) S.S.L.R. 195, and other cases.

The learned Judge then stated that as the system of land registration in Kedah was based upon the Australian Torrens system, which has as one of its main objects the means of knowledge afforded thereby to the public as to charges upon and encumbrances affecting land, he was of the opinion that if the mere deposit of a grant constituted the depositee an equitable chargee of the land and he was thus entitled to enforce his charge by sale, one of the special objects of the Enactment would be defeated, inasmuch as the Register would contain no entry whatever of the charge so created and the scope for fraudulent dealings in regard to land would be broadened accordingly. He therefore dismissed the appeal.

Having come to the conclusion that the Appellant is an equitable mortgagee or chargee it is necessary to consider whether there is anything in law or equity which prevents the relief sought by the Appellant being granted to him.

In considering this point, the fact that there is no prior encumbrance registered against the land nor is there any attachment of the land or caveat registered, is of paramount importance. The issue is between the Appellant and Respondent only and there are no rights in third parties to be considered.

The facts shew that the debt is still owing and although the personal remedy against the debtor is barred by limitation the security by which the creditor has become an equitable mortgagee is still current and effect can be given to the same if one applies Section 10 of the Courts Enactment. I have set out the reasons of the learned Judge for not so applying this Section but it seems to me that his argument for not doing so is fallacious. In what way would the granting of equitable relief to the Appellant be contrary to the objects of the Land Enactment or facilitate fraud? There is no prior encumbrance registered and it has not been suggested that if there had been, the Appellant's equitable rights would take precedence to such prior registered encumbrance.

There is no caveat registered (even if that had been possible) nor has the land been attached. If there had been a caveat registered then the position would have been covered by the decision in Kedah Civil Appeal No. 5 of 1349, *K.A.L.R.M. Karuppan Chetty* v. *A.R.P.L.S.P. Muthia Chetty*. If there had been an attachment of the land in respect of a judgment then it is probable that the decision of the Court of Appeal in *L.R.M. Raman Chetty* v. *K.V.A.L. Muthiah Chetty*: 3 F.M.S.L.R. 177 would prevail,

but as I have said, there is neither a prior encumbrance, caveat or attachment registered, nor are the rights of third parties affected.

On the other hand, would it not be facilitating fraud to refuse the Appellant his equitable rights? The debt is owing by the Respondent, he has pledged his title deed to the land as security for the debt, but he resists the enforcement of such security to recover the debt which is still owing.

In my opinion, it is a clear case for the application of Section 10 of the Courts Enactment, and the Appellant should have the Declaration asked for. It follows as a natural sequence that he is also entitled to an order for sale and to pay himself out of such proceeds of sale.

The appeal, therefore, succeeds, the decision of the learned Judge of the First Division is reversed, and the Appellant should have his costs of this appeal and of the proceedings in the Courts below in respect of the issue as to the Declaration. The deposit should be paid out to the Appellant or his Solicitor.

Appeal allowed.

Solicitors for the plaintiff-appellant—
Huck Lim & Hock Soo.